



IN THE HIGH COURT OF KENYA  
MILIMANI LAW COURTS  
COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E300 OF 2019

BETWEEN

NATIONAL BANK OF KENYA LIMITED .....CLIENT/APPLICANT

AND

RACHUONYO & RACHUONYO ADVOCATES.....ADVOCATE/RESPONDENT

RULING

**Introduction and Background**

1. The application before the court is the reference filed by the Applicant from the decision of the Deputy Registrar made under **Rule 11(2)** of the **Advocates Remuneration Order** ("the **Order**") and brought by the Chamber Summons dated 19<sup>th</sup> June 2020. It is in respect of the ruling of the Deputy Registrar dated 28<sup>th</sup> April 2020 following taxation of an Advocate/Client Bill of Costs dated 26<sup>th</sup> July 2019.
2. The application is supported by the affidavit of the Applicant's Legal Officer, Chrispus Maithya, sworn on 19<sup>th</sup> June 2020. It is opposed by the Respondent through the replying affidavit of Clifford Owuor Rachuonyo, an advocate and partner in the Respondent law firm ("the Advocates"), sworn on 20<sup>th</sup> July 2020. The reference was canvassed by way of written submissions with the parties advancing their respective positions.
3. It is common ground that the Advocates represented the Applicant in **Civil Appeal No. 323 of 2014: Kenya National Capital Co-operation Limited v Meridian Airlines Limited & 4 Others** ("the Appeal"). In the Bill of Costs, the Advocates claimed a total of Kshs. 7,551,559.78 for services rendered to the Bank in the Appeal. The Advocates' claim for instruction fees for the Appeal was pegged at Kshs. 3,116,770.00.
4. The Deputy Registrar considered the parties' rival submissions and documents on record and by his ruling dated 28<sup>th</sup> April 2020 stated in part as follows:

.... As to the subject matter of the suit, I do agree that the Court of Appeal allowed the judgment as per the plaint. The Plaintiff had 2 prayers in addition to costs. The 1<sup>st</sup> prayer was for judgment against the first Defendant for Sh. 42,646,155.5 together with interest thereon at the rate of 35% per annum from 16<sup>th</sup> December 1996 until payment in full. The second prayer was for judgment against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally for Kshs. 10,992,430/- with interest thereon at the rate of 40% per Annum from 22<sup>nd</sup> August 1995 until payment in full ..... Computation amount payable inclusive of Prayer (a) of the Plaintiff from 16<sup>th</sup> December 1996 to the date of Appeal Court judgment on 26<sup>th</sup> May 2017 is Kshs. 347,957,577.20. The amounts payable on prayer (b) inclusive of interest as at the date of Court of Appeal Judgment is Kshs. 106,737,914. These two amounts put the value of the subject matter at Kshs. 454,695,491.20. I am going to use this as the value of the subject matter as I am not guided as to when the decree of the Court of Appeal was realized and I find the date of judgment to be a reasonable time to compute the subject matter. If we assessed the instruction fees.....and applied the 1997...Order as opposed to the 2014...Order that has been proposed by the Respondent, instruction fees would be Kshs. 6,860,432.40. It is on this basis that I will not assault the amounts proposed by the Applicant and I shall tax the same as prayed at Kshs. 3,116,770/- as I find the same reasonable under the scale. The instruction fees being as drawn, the same shall apply to the item on getting up fees which shall remain as drawn.....

5. In addition to awarding the sum of Kshs. 3,116,770/- above as instruction fees, the Deputy Registrar taxed off Kshs. 2,254,506.60/- from the total bill and certified Kshs. 5,297,053.18/- as the amount due to the Advocates. It is this decision that has now precipitated this reference.

The parties filed a consent dated 9<sup>th</sup> October 2020 indicating inter alia that with the exception of items number 14 and 30(a), all the other items in the Bill of Costs be taxed and allowed to the total sum of Kshs. 261,046/- and that the court determines the said Items number 14 and 30(a) relating to instruction fees and getting up fees. The parties further concurred that the amount ultimately taxed be reduced by the sum of Kshs. 2,242,500/- being the amount already paid to the Advocates by the Applicant.

### **The Applicant's Reference and Submissions**

6. The Applicant avers that the Deputy Registrar erred in principle as he arrived at a decision which is contrary to the law applicable and by failing to exercise the powers and discretion given to him under the **Order** by failing to apply the principles and formula provided for in **Schedule 6** of the **2014 Order** for assessing the instruction fees by arriving at an improper determination on the value of the subject matter of the Appeal on the basis of which he proceeded to determine the instruction fees.

7. The Applicant faulted the Deputy Registrar for determining that the value of the subject matter was Kshs. 454,695,491.20 and that in factoring in the interest awarded when computing the value of the subject matter of the Appeal, the Deputy Registrar ignored the trite principle of taxation that instruction fees is a static item earned immediately upon filing a defence and therefore cannot be based on an ever fluctuating component of interest which would only be ascertainable once the amount owed is paid in full as the date for such payment remains unknown. That there was no legal or factual basis for the Deputy Registrar to calculate the interest with reference to the date when the Court of Appeal delivered its judgment even after noting in his ruling that there was no evidence of payment of the judgment sum. The Applicant thus stated that the award of Kshs. 3,116,770.00 as instruction fees was inordinately high and did not accord the circumstances of the Appeal.

8. The Applicant submitted that the Deputy Registrar erred by awarding getting up fees despite there being no certificate by the court to the effect that the case is a proper one for the award of getting up fees in view of the extent or difficulty of the work done as provided for under paragraph 3 of the **Schedule 6** of the **2014 Order**. Further, that the getting up fees was based on the grossly exaggerated instructions fees.

9. The Applicant contended that the Deputy Registrar did not apply his mind properly on the Appeal, the Bill of Costs and the written and oral submissions on the taxation by the Applicant on the quantum of fees payable for the business conducted by the Advocates and thereby arrived at an erroneous decision resulting in awarding fees that were manifestly disproportionate to the suit, unreasonable and so inordinately high as to amount to substantial oppression and injustice to the Applicant.

### **The Advocates' Response**

10. On the substance of the Bill of Costs and in response to the Applicant's submission that the Deputy Registrar erred in affirming the instruction fees claimed in the Bill of Costs based on a portion of the decretal sum as compared to the actual sum due under the decree on the date of Judgment, the Advocates responded that the Deputy Registrar wholly adopted the Applicant's contention, namely that instruction fees ought to be assessed from the Judgment delivered by the Court of Appeal, and not the primary pleadings, being the Plaintiff and the Defence, having wrongly assumed and considered that the decretal sum awarded in the Judgment on the appeal was nominal, and was less than the sums pleaded in the dismissed Plaintiff. They submitted that the decretal sum in the Judgment of the Court of Appeal, as computed by the Deputy Registrar, being the sum of Kshs. 454,695,491.20 is not erroneous, and reflects what is the actual sum awarded and due to the Applicant by the Court of Appeal and the said computation did not constitute or comprise a futuristic entitlement, as wrongly implied by the Applicant.

11. The Advocates submit that the subject matter and its value as declared by the Deputy Registrar is an actual and static item, disclosed on the face of the Judgment and decree of the Court of Appeal and there is no basis for the Applicant to seek to have the Court to derive the value of the subject matter in the taxation by making reference to the actual date of filing of the defence in the Superior Court, when the instructions to it were to institute and to prosecute an appeal for recovery of all sums due under the contracts of lending, the charge and the guarantees, including interest.

12. The Advocates state that as a matter of principle, instruction fees are to be assessed upon the face of the primary pleadings, settlement reached or final Judgment. In this case, the Deputy Registrar was correct in arriving at the subject matter and its value, at Kshs. 454,695,491.20 being sums expressly pleaded in the filed Memorandum of Appeal, and awarded by the Judgment and decree of the Court of Appeal.

13. The Advocates deponed that the Deputy Registrar exercised his discretion judiciously, rationally and in accordance with established principles of taxation in holding that the instruction fees as computed by it were reasonable, were actually less than what would be due, and therefore to the Applicant's advantage, taking into account the real substantial decretal sum, from which a basic instruction fee of Kshs. 6,860,432.40 was the true sum justified. The Advocates thus contend that its Bill of Costs was substantially under calculated, and there was no basis in interfering with or rejecting the claimed basic instruction fees and that it is absurd for the Applicant to now claim that a fee assessed on the principles put forth by the Applicant has generated an unacceptable outcome.

14. In response to the Applicant's submission that they are not entitled to an award of Getting up fees in the absence of a Certificate from the trial Court, the Advocates responded that under the **Court of Appeal Rules, Rule III (3)**, instruction fees for an appeal on advocate-client basis are computed under **Schedule 6** of the **Order** and that under that provision, appeals are treated as "defended suits" hence the Getting up fee is earned upon the appeal being set down for hearing and upon the exchange of written submissions as directed at the stage of Case Management Conference. They submit that the Applicant has misconstrued the true meaning and application of **Rule 3 of Schedule 6** titled "fees for Getting up on appeal" of the **2014 Order**, which specifically relates to, and provides for appeals filed in the High Court from a Judgment of the Subordinate Court where taxations in such appeals ordinarily provides for Getting up fees on the basis of a Certificate issued by a Judge of the High Court trying the appeal. Therefore, the Deputy Registrar was correct in ignoring the aforesaid provision and treating the taxation as a *defended suit* in which Getting up fees were automatically earned following conclusion of the hearing and Judgment by the Court of Appeal.

15. The Advocates submit that there is no requirement or practice that stipulates certification for appeals in the Court of Appeal in order for an Advocate to be lawfully entitled to earn Getting up fees and further that no rule, binding precedent or proposition of any principle of taxation has been cited and urged by the Applicant in support thereof.

16. The Advocates conclude that the Reference lacks as the Applicant has not demonstrated any basis for setting aside any item of taxation or the taxation in its entirety as erroneously sought. They contend that the award in their favour is neither manifestly excessive nor disproportionate as alleged by the Applicant.

### **Analysis and Determination**

17. The Advocates impugned the Reference on the ground that it is incurably defective in the absence of a duly styled and filed Notice of Objection, expressly setting out the contested items of taxation, and inviting the jurisdiction of the Court for review in accordance with **Rule 11 (1)** of the **Order**. They also contend that the grounds on the face of the Reference are vague, prolix, unsubstantiated and unnecessarily argumentative without at all setting out specific grounds or points of law for reconsideration in a review as required by established law and practice.

18. I find that the technical issues raised by the Advocates were settled by the consent dated 9<sup>th</sup> October 2020 in which the parties agreed on the issues for resolution. The main issues falling for determination therefore are whether the Deputy Registrar erred in awarding the instruction fees and Getting Up fees in the matter he did.

### **Instruction Fees**

19. I do not think there is any dispute about the approach this court should take in dealing with a Reference on assessment of instruction fees. In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** the Court of Appeal distilled the principle as follows:

On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In **Arthur v Nyeri Electricity Undertaking [1961] EA 497**, the predecessor of this Court said at page 492 paragraph I: “where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

20. The principle to be applied when assessing instruction fees in a suit are well settled. In **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** the Court of Appeal outlined the principle as follows:

We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances .

21. Further, the Court of Appeal in **Peter Muthoka & another v Ochieng & 3 others [2019] eKLR** expounded on the principles in **Joreth Ltd v Kigano & Associates(supra)** and set down the proper basis of taxing the instruction fees as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

22. It is common ground that judgment was entered by the Court of Appeal in the Appeal and therefore, following the dicta in the **Peter Muthoka case(supra)** the Deputy Registrar ought to have determined the value of the subject matter from the said judgment as a starting point, which he rightly observed. The judgment of the appellate court held in summary and in part that, “.... Judgment is entered in favour of the appellant in terms of the plaint filed in the High Court dated 10<sup>th</sup> March, 1997...”

23. The terms of the Plaint are what I reproduced above in the Deputy Registrar’s decision where the Plaintiff, the Applicant herein, was awarded Sh. 42,646,155.5 together with interest thereon at the rate of 35% per annum from 16<sup>th</sup> December 1996 until payment in full against the 1<sup>st</sup> Defendant therein and Kshs. 10,992,430/- together with interest thereon at the rate of 40% per Annum from 22<sup>nd</sup> August 1995 until payment in full as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally.

24. It appears that the point of departure of the parties is whether the Deputy Registrar correctly ascertained the value of the subject matter. The Applicant contended that the Deputy Registrar should not have included in the subject matter including the interest thereon as it fluctuates and can only be ascertained once the amount owed is paid in full. In this case, the Applicant argued that the date for such payment remains unknown.

25. I do not find any fault by the Deputy Registrar in computing the interest payable at the point of the Court of Appeal’s judgment because at the point of delivery, the Court of Appeal decision substituted the High Court Judgement with the its own judgment. Since the interest rate was known, it cannot be said that the amount based on the judgment remains unascertained. Not is the argument that the value of the subject matter depends on whether the debtor makes payment. The Applicant arguments are insufficient for the court to intervene hence I cannot say

that the award of Kshs. 3,116,770.00 as instruction fees was inordinately high as it was based on the right legal and factual principles.

### **Getting Up Fees**

26. The issue of Getting up fees in an appeal is governed by **Rule 3 of Schedule 6** of the **Order** titled "*fees for Getting up on appeal*" which specifically relates to, and provides for appeals filed in the High Court from a Judgment of the Subordinate Court where taxations in such appeals ordinarily provides for Getting up fees on the basis of a Certificate issued by a Judge of the High Court trying the appeal. It provides as follows:

#### 3. Fees for getting up an appeal

In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee.

27. A simple reading and interpretation of the aforementioned provision indicates that it is appeals 'to' the High Court rather than 'from' the High Court that require certification from the court hearing the appeal, which is the High Court. I am in agreement with the Advocates on this front that the Applicant misapprehended and misconstrued the intention of Paragraph 3 above. In view of the foregoing, this ground fails.

### **Conclusion and Disposition**

28. In conclusion, it is my finding that the Applicant's Reference dated 19<sup>th</sup> June 2020 is lacks merit and is hereby dismissed with costs. The costs due to the Advocates shall be certified by the Deputy Registrar in accordance with the consent of the parties.

### **SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2021**

**J. M. MATIVO**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Applicant.

Mr Juma instructed by Mutua-Waweru and Company Advocates for the Client/Respondent.